

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

The Honorable Amy W. McCulloch, Probate Judge

Appellate Case No. 2019-000727

RECEIVED
JUN 17 2019
S.C. SUPREME COURT

In the Matter of the Estate for Bertha Maust-Thompson

Terri Ann Thompson, Wendy K. Thompson, and Robert
M. Thompson, Jr, as Co-Personal Representatives of the
Estate of Robert Miller Thompson, Sr.,.....Respondents,

v.

Marilyn M. White, as Personal Representative of the
Estate of Bertha Maust-Thompson,.....Petitioner.

**REPLY IN SUPPORT OF
MOTION TO DISMISS PETITION
FOR WRIT OF CERTIORARI**

John M. S. Hofer
Chad N. Johnston
John W. Roberts
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
(803) 252-3300

Attorneys for Respondents

June 17, 2019
Columbia, South Carolina

Respondents, in accordance with Rule 240, SCACR, hereby submit the within reply in support of their motion to dismiss Petitioner's petition for writ of certiorari to the court of appeals' orders regarding an order of the Richland County probate court in the above-captioned matter (Petition). As set forth in their motion to dismiss, Respondents seek dismissal of the Petition as moot because the underlying issue in this case was whether a federal estate tax return should be filed for a decedent's estate, making available to her surviving spouse an estate tax benefit. Subsequent to Petitioner's filing of her appeal to the court of appeals and the instant Petition, the estate tax return was filed, irrevocably vesting the surviving spouse with the right to this estate tax benefit.

In her return to the motion to dismiss, Petitioner asserts that this matter is not moot for two reasons: (1) the irrevocable election for the tax benefit can nevertheless be revoked; and (2) the special administrator appointed by the probate court to prepare and file the tax return to make the tax benefit election was not permitted to do so because the probate court's order had been automatically stayed by Petitioner's filing a notice of appeal of that order with the court of appeals. These contentions are without merit and the Petition should therefore be dismissed.

ARGUMENT

I. This matter is moot because the tax election at issue in this case has been made and is irrevocable under federal law.

As explained in their motion to dismiss, Respondents sought an order from the probate court enjoining Petitioner to timely file the federal estate tax return for the estate of Bertha Maust-Thompson (the Decedent) to elect "portability" of the deceased spousal unused exclusion (DSUE) amount for the benefit of the estate of her surviving spouse, Robert M. Thompson, Sr. Mem. in

Supp. of Mot. to Dismiss at 2-3;¹ [Appx. at 3-17 (January 26 Order).] As the probate court found, this portability election provides a tax benefit valued at approximately \$1.2 million to Mr. Thompson’s estate, cannot be used by anyone other than Mr. Thompson’s estate, and does not take away from or harm Decedent’s estate or any beneficiary of her estate. [Appx. at 7, 15.] Accordingly, the probate court enjoined Petitioner to timely prepare and file the estate tax return of Decedent’s estate to elect portability of the DSUE and further provided that a special administrator would be appointed to prepare and file the return should Petitioner fail to comply with the directives of its order. [Appx. at 16-17.] Petitioner subsequently failed to comply with the probate court’s order—a fact that is undisputed, *see* footnote 1, *supra*—and a special administrator was appointed. Mem. in Supp. at 5-6, Exs. C (March 15 Order) & D (April 15 Order). The special administrator thereafter prepared and timely filed the estate tax return to elect portability. *Id.* at 7-8, Ex. E (May 28, 2019 Johnson Aff.). Mr. Thompson’s estate then filed its own estate tax return reflecting the portability election for Decedent’s estate and incorporating the DSUE amount. *Id.* at 8, Ex. F (May 29, 2019 Varholla Aff.); Ex. A, June 17, 2019 Varholla Aff. at ¶¶6-7.

Pursuant to federal statute, the portability election, once made, is “irrevocable.” 26 U.S.C.A. § 2010(c)(5)(A); *see Woodbury v. C.I.R.*, T.C. Memo. 1988-272 (U.S. Tax Court 1988) (“The general rule that once a taxpayer makes an elective choice on a return his election is irrevocable is well established.”). In her return to the motion to dismiss, Petitioner does not identify any procedure under federal law for revoking an election expressly made irrevocable by the applicable statute. Petitioner cites only to a limited Internal Revenue Service (IRS) procedure for “seeking relief *to elect portability*” after the election deadline passes, *see* Return at 8, but this IRS

¹ As set forth in her return to the motion to dismiss, “Petitioner does not dispute the facts and procedural posture as stated by Respondents in their motion to dismiss.” Return at 1.

“Revenue Procedure” does not authorize the revocation of a portability election that was already made. Nor could this procedure authorize such action because IRS procedures cannot conflict with the applicable statutory provisions, which, here, explicitly provide that the “election, once made, shall be irrevocable.” 26 U.S.C.A. § 2010(c)(5)(A); *see, e.g., Brook, Inc. v. C.I.R.*, 799 F.2d 833, 836 n.4 (2nd Cir. 1986) (“We will disregard a [IRS Revenue] Ruling if the Ruling conflicts with the statute it supposedly interprets or with that statute’s legislative history or if the Ruling is otherwise unreasonable.”)

Moreover, the requirement that the election become irrevocable once it is made also is necessary and makes sense because the election is relied upon by the estate of the surviving (*i.e.*, second-to-die) spouse when that estate’s tax return is filed. Here, Mr. Thompson’s estate has filed its estate tax return and has incorporated and relied upon the portability election and corresponding DSUE amount set forth on Decedent’s tax return to calculate Mr. Thompson’s estate’s tax liability. Ex. A; Mem. in Supp. at 8, Ex. F. In her return to the motion to dismiss, Petitioner did not identify any procedure—because there is none—by which Petitioner could even have communications with the IRS about Mr. Thompson’s estate tax return, let alone, seek to alter his return. *Cf.* 26 U.S.C.A. § 6103(a) (prohibiting IRS from discussing tax returns and return information with third-parties). Therefore, there is no way to revoke the irrevocable portability election and, regardless of any decision by this Court or any other appellate court, there is no method or procedure for Petitioner to contact the IRS to attempt to change the now-filed estate tax return of Mr. Thompson’s estate.

Recognizing the lack of authority to support her contention, Petitioner resorts to making a comment in a footnote—which is not supported by any part of the appendix in this matter under Rule 242(e), SCACR, or any documentation or affidavit as required by Rule 240(c)(3), (e), SCACR—about some vague “contact” she purportedly had at some unknown time with some

unknown IRS employee (the purported substance of which also does not appear to even support her contentions). Return at 8 n.3. Regardless, this unsupported and unverified statement is not evidence or reflective of the actual law but rather is just another example of Petitioner ignoring the rules of procedure, *see* discussion Section II *infra*, and should be disregarded. This is especially so considering that this newfound and unsupported position also is in direct contradiction to Petitioner’s statement to the probate court that:

[t]he Personal Representative is cognizant of the short time frame for the appeal and will request that the appellate process be expedited to accommodate the May 28, 2019 deadline for the *irrevocable* election to be made.

See Ex. B, Mot. for Reconsideration at 3 n.2 (Emphasis supplied).² Thus, just as she previously recognized that this matter would be rendered moot by the passing of the May 28, 2019 return filing deadline, *see* Mem. in Supp. at 9, Petitioner has recognized the irrevocability of the portability election. It is only now—after the tax return has been filed and election made—that Petitioner reverses, without support, her prior positions. *But see Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 303, 737 S.E.2d 601, 613 (2013) (“Appellant may not argue a different position on appeal.”) (citing *McLeod v. Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012)).

In short, the portability election—which is what this case is all about—has been made and, pursuant to federal statute, is irrevocable. After the probate court ordered the election to be made, Petitioner had myriad opportunities to attempt to seek expedited appellate review or to attempt to

² Notably, Petitioner made this statement almost two months after she had filed her notice of appeal and, up to that point, had made no effort to have her appeal expedited. In addition, despite her representations to the probate court, apart from submitting an improper motion for expedited consideration of her motion for reconsideration with the court of appeals after that court had dismissed her appeal and after the special administrator was appointed, Petitioner did nothing to expedite the appellate process. In fact, Petitioner did the exact opposite. Mem. in Supp. at 9-10.

obtain a ruling from the probate court or an appellate court to prevent the making of the election, which she previously recognized would render this matter moot, but she purposefully did not avail herself of those opportunities and instead pursued an apparent strategy to try to “run out the clock” on the election deadline. This chosen strategy backfired. However, all that matters is that the election has been made, it is irrevocable as a matter of law, and, thus, cannot be undone. Therefore, this matter is moot.

II. Petitioner’s sole claimed basis for revocation of the election is meritless.

As discussed, the portability election is irrevocable and cannot now be undone. Even so, the only reason that Petitioner suggests as a ground for possible revocation of the election—that the special administrator was not “duly qualified” to file the estate tax return because the proceedings before the probate court were allegedly stayed at the time of his appointment—is completely without merit.

The special administrator was appointed and ordered by the probate court to prepare and file Decedent’s estate tax return to elect portability. Mem. in Supp. Exs. C & D. The special administrator prepared the return based primarily on information and documents provided by Petitioner, and once the return was prepared, the special administrator provided it to the probate court and the parties for review and comment. *Id.* After receiving comments, including comments from Petitioner, the special administrator finalized, signed, and properly filed the estate tax return with the IRS along with a copy of his “Certificate of Appointment as Special Administrator.” *See* Ex. C (certifying that “W. Steven Johnson, Esquire is the duly qualified Special Administrator” for Decedent’s estate” for the “sole purpose of preparing and filing the estate tax return”); Mem.

in Supp. Ex. E, Johnson Aff. at ¶6. Accordingly, the estate tax return was properly filed by the “duly qualified executor or administrator” of Decedent’s estate.³ 26 C.F.R. § 20.6018-2.

Petitioner’s contention that the special administrator was not “duly qualified” on the sole ground that the probate court should not have appointed him because the January 26 Order had been stayed by Petitioner’s filing of her notice of appeal with the court of appeals also is just wrong. Simply put, as Petitioner’s own actions and filings demonstrate, there was no stay imposed by Petitioner’s improper appeal of the January 26 Order to the court of appeals and her argument that there was a stay is unpreserved and unfounded.

As discussed in Respondents’ Memorandum in Support of Motion to Dismiss, subsequent to the issuance of the January 26 Order, Respondents consented to Petitioner’s request for consent to a direct appeal to this Court under S.C. Code Ann. § 62-1-308(l).⁴ [Appx. at 18.] Inexplicably, Petitioner filed her notice of appeal with the court of appeals even though S.C. Code Ann. § 62-1-308(l) provides only for a direct appeal to this Court, Respondents only consented to a direct appeal to this Court, and the court of appeals does not have jurisdiction over a direct appeal from the probate court. *See* S.C. Code Ann. § 14-8-200(a) (providing for jurisdiction by the court of appeals in appeals directly from various lower courts and agencies, but not the probate court). Putting aside for the moment that Petitioner filed her appeal in an appellate court that does not have jurisdiction,

³ For this reason, Petitioner’s attempt to compare this situation to the treatment by the IRS of unsigned tax returns is entirely inapposite.

⁴ Contrary to Petitioner’s patently false statement in her return to the motion to dismiss, Respondents did not “consent to a direct appeal to the South Carolina Court of Appeals.” Return at 4. As expressly set forth in the “consent” letter Petitioner filed with her notice of appeal, [Appx. at 18,] and consistent with S.C. Code Ann. § 62-1-308(l), Respondents only consented to a direct appeal to this Court. And contrary to Petitioner’s suggestion, this consent was not an acknowledgement that the January 26 Order was appealable. Rather, Respondents were simply responding to Petitioner’s request for consent to a direct appeal. In other words, *if* there was going to be an appeal, then Respondents consented to that appeal being filed with this Court.

which Petitioner now concedes,⁵ and that the January 26 Order was not immediately appealable, as the court of appeals determined, Petitioner's filing of her notice of appeal of the January 26 Order did not stay the requirements and directives of the January 26 Order pursuant to the applicable statute and rules of procedure.

Petitioner filed her appeal of the January 26 Order pursuant to S.C. Code Ann. § 62-1-308(l), which provides:

If the parties not in default consent either in writing or on the record at a hearing in the probate court, a party to a final order, sentence, or decree of a probate court who considers himself injured by it may appeal directly to the Supreme Court, and ***the procedure for the appeal must be governed by the South Carolina Appellate Court Rules.***

(Emphasis supplied.) Pertinent here, Rule 241(b)(8), SCACR, specifically provides that there is ***no automatic stay*** in “an appeal from an order granting an injunction or temporary restraining order.” The January 26 Order granted an injunction and required the timely filing of the estate tax return. *See* Petition at 4 (“the Order appealed . . . granted an injunction”); [Appx. at 16-17.] Accordingly, even if the Petitioner's appeal had been filed in an appellate court that had jurisdiction and had been taken from an appealable order, the January 26 Order was not stayed by Petitioner's filing of her notice of appeal.

Notably, Petitioner specifically acknowledged that the January 26 Order was not stayed by: (1) purporting to comply with the January 26 Order's first interim deadline by informing the probate court that Petitioner had hired a CPA firm to complete the estate tax return; and (2) by filing a “motion for supersedeas” with the court of appeals on the same date as the January 26 Order's second interim deadline seeking “a stay of the probate court order” pursuant to Rule 241(c)

⁵ *See* discussion *infra* p. 10.

of the South Carolina Appellate Court Rules.⁶ Ex. D, Mot. for Supersedeas at 2. That is, Petitioner initially complied with, and later *sought a stay of*, the very order that she now claims was automatically stayed. It was not until after her appeal was dismissed by the court of appeals and the special administrator was appointed that she began claiming that the January 26 Order had been stayed by her filing of the notice of appeal. This type of gamesmanship should not be tolerated, much less rewarded by the granting of a petition solely within this Court's discretion. And it need not be because, by failing to raise this issue prior to the probate court's March 15 Order appointing the special administrator, Petitioner's newfound claim is not preserved.⁷ See, e.g., *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not") (citing *Smith v. Stoner*, 594 F.Supp. 1091, 1118 (N.D. Ind. 1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived.")).

But even if such argument was preserved, it is erroneous. Subsection (h) of S.C. Code Ann. § 62-1-308, on which Petitioner relies, is not applicable to Petitioner's appeal of the January 26 Order because she brought that appeal pursuant to the "direct appeal" provisions of subsection (l) of that statute. See S.C. Code Ann. 62-1-308 (providing, "***Except as provided in subsection (l)***), appeals from the probate court must be to the circuit court and are governed by the following rules"

⁶ Once again demonstrating her disregard of the rules of procedure, Petitioner filed her "motion for supersedeas" seeking a stay of the probate court's January 26 Order with the court of appeals even though Rule 241(d), SCACR, expressly requires any "application for supersedeas" to be made first to the lower court absent "extraordinary circumstances," which Petitioner did not attempt to show in her motion to the court of appeals. Ex. D.

⁷ Petitioner opposed the appointment of the special administrator on the basis that the probate court did not have jurisdiction but did not raise the argument she does now (*i.e.*, that the January 26 Order was stayed pursuant to S.C. Code Ann. § 62-1-308) until after the probate court's March 15 Order appointing the special administrator. Ex. B.

and listing the rules for appeals to the circuit court in subsections (a) through (k) of the statute) (Emphasis supplied.) By the plain terms of the statute, subsection (h) of S.C. Code Ann. 62-1-308 does not apply to appeals brought pursuant to S.C. Code Ann. 62-1-308(l). Instead, appeals brought under subsection (l) are governed by the South Carolina Appellate Court Rules, which, as discussed above, specifically provide that there is *no automatic stay* in “an appeal from an order granting an injunction or temporary restraining order.” Rule 241(b)(8), SCACR. Therefore, in addition to not being preserved, Petitioner’s sole argument as to why the appointment of the special administrator was not appropriate is wrong.

Moreover, even if Petitioner’s argument had any validity, which it does not, the probate court had the power to lift any stay, *see* Rule 241(a), SCACR, which it effectively did by ordering the preparation and filing of the estate tax return so the return filing deadline was not missed, thereby preventing the portability election, which the probate court specifically ordered be made, from forever being lost. Mem. in Supp. Exs. C & D; [Appx. at 15 (“Any further refusal to file the estate tax return to elect portability of the DSUE amount ‘jeopardize[s] unreasonably the interest’ of Mr. Thompson and his estate because the DSUE will be forever lost if the estate tax return is not timely filed....”)] In fact, the probate court specifically instructed the parties in the April 15 Order that the special administrator was required to file the return “unless stayed by an order of an appellate court of South Carolina.” Mem. in Supp. Ex. D. Despite this instruction, Petitioner did not seek a stay from this Court.

In addition to the above, multiple other reasons demonstrate that there was no stay, nor could there have been. First, as the court of appeals determined in dismissing Petitioner’s appeal, the January 26 Order was not an appealable “final order,” as required by S.C. Code Ann. § 62-1-308(l). February 15, 2019 Court of Appeals Order (“Dismissal Order”) (citing *Dorn v. Cohen*, 421

S.C. 517, 809 S.E.2d 53 (2017) & *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008)) [Appx. at 25-26.] Because the January 26 Order was not appealable, the filing of the notice of appeal necessarily had no effect and could not have resulted in the imposition of any stay under S.C. Code Ann. § 62-1-308 or the South Carolina Appellate Court Rules. Further, as Petitioner now concedes, she filed her appeal with an appellate court that did not have jurisdiction.⁸ *Compare* Petition at 2 (“Petitioner, however, filed the Notice of Appeal in the Court of Appeals rather than the Supreme Court.”) *with* Petition at 10 (“[B]y law, the Court of Appeals lacked jurisdiction over this appeal...”). Petitioner also did not have Respondents’ consent to a direct appeal to the court of appeals. Suffice to say, a notice of appeal that does not comply with the applicable statutory requirements and that is filed with an appellate court that does not have jurisdiction could not have resulted in the imposition of any stay.

In short, Petitioner’s sole argument for why the appointment of the special administrator was not appropriate is baseless and, in any event, is not preserved. The January 26 Order also was not appealable, and even if it was, Petitioner did not properly appeal from it. Thus, no stay could have resulted from Petitioner’s filing of the notice of appeal with the court of appeals. Accordingly, the appointment of the special administrator was entirely appropriate and Petitioner’s sole contention that the filing of the estate tax return was not effective is meritless.

⁸ In her Petition, Petitioner contends that the court of appeals should have transferred this matter to this Court. However, Petitioner filed her appeal with the court of appeals and also did not raise the issue of that court’s lack of jurisdiction in her petition for rehearing of the Dismissal Order. Accordingly, Petitioner has not preserved that issue. *See Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (“Only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” (Emphasis in original)) (quoting Rule 226(d)(2), SCACR). Petitioner also cannot complain about the consequences of her own litigation strategy. *See Equivest Financial, LLC v. Ravenel*, 422 S.C. 499, 505, 812 S.E.2d 438, 441 (Ct. App. 2018) (“A party cannot complain of error his own conduct has induced.”) (citing *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006)).

CONCLUSION

Petitioner's improper (and often baffling) actions since the probate court's January 26 Order have resulted in a convoluted and bizarre procedural history. However, this Court need not wade through any of that history because the only issue in this case has been rendered moot by the filing of the irrevocable portability election. Therefore, Respondents respectfully request that this Court dismiss the Petition as moot or, alternatively, simply deny the Petition.⁹

Respectfully Submitted,



John M.S. Hoefer, Esquire (SC Bar # 2549)

Chad N. Johnston, Esquire (SC Bar #73752)

John W. Roberts, Esquire (SC Bar # 78889)

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202

(803) 252-3300

jhoefer@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

jroberts@willoughbyhoefer.com

Attorneys for Respondents

Columbia, South Carolina
June 17, 2019

⁹ Respondents reserve their right to raise any grounds for denying the Petition should the motion to dismiss be denied.

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

The Honorable Amy W. McCulloch, Probate Judge

Appellate Case No. 2019-000727

In the Matter of the Estate for Bertha Maust-Thompson

Terri Ann Thompson, Wendy K. Thompson, and Robert
M. Thompson, Jr, as Co-Personal Representatives of the
Estate of Robert Miller Thompson, Sr.....Respondents,

v.

Marilyn M. White, as Personal Representative of the
Estate of Bertha Maust-Thompson.....Petitioner.

AFFIDAVIT OF JULIA VARHOLLA

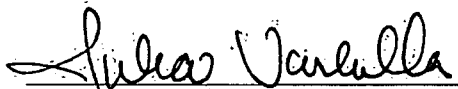
PERSONALLY APPEARED BEFORE ME **Julia Varholla**, who deposes and says as follows:

1. I am over 18 years of age, and I am qualified and competent to make this affidavit.
2. I make this affidavit based upon my personal knowledge, except as to those matters stated upon information and belief and, as to those matters, I believe them to be true.
3. I am an attorney with the law firm of Lovett Bookman Harmon Marks LLP, and am licensed to practice in the Commonwealth of Pennsylvania.
4. I have been hired by the Estate of Robert Miller Thompson, Sr., to assist in the administration of the Estate and to prepare and file the federal estate tax return for Mr. Thompson's Estate.


5. I previously submitted an affidavit dated May 29, 2019, in conjunction with Respondents' Motion to Dismiss Petition for Writ of Certiorari in the above-captured matter stating that I planned to file with the Internal Revenue Service the federal estate tax return for Mr. Thompson's Estate on or about May 31, 2019.

6. I did, in fact, file the estate tax return for Mr. Thompson's Estate with the Internal Revenue Service on May 31, 2019.

7. The filed return took into account and relied on the portability election and the deceased spousal unused exclusion (DSUE) amount set forth on the federal estate tax return filed on behalf of the Estate of Bertha Maust-Thompson because Mr. Thompson was the surviving spouse of Mrs. Maust-Thompson.


Julia Varholla, Esquire

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 17 DAY OF
JUNE 2019.


Mary E. Keane
Notary Public for the Commonwealth of Pennsylvania

My commission expires 11-30-2022

[SEAL]

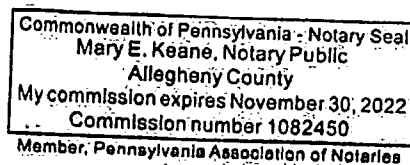


EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)

IN THE PROBATE COURT

CASE NO. 2017-ES-40-01330

**IN THE MATTER OF THE ESTATE
FOR BERTHA MAUST-THOMPSON,
DECEDENT**

Terri Ann Thompson, Wendy K. Thompson)
and Robert Miller Thompson, Jr., as)
Co-Personal Representatives of the Estate)
Of Robert M. Thompson, Sr.,)

Applicants,)

vs.)

Marilyn M. White as Personal)
Representative of the Estate of Bertha)
Virginia Maust-Thompson,)

Respondent.)

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

COMES NOW Marilyn M. White, Personal Representative of the Estate of Bertha Virginia Maust-Thompson (the "Personal Representative"), by and through her undersigned counsel, who hereby submits this Notice of Motion and Motion for Reconsideration of the Court's Order of Friday, March 15, 2019, which was filed at 6:33 p.m. The March 15, 2019 Order was in furtherance of the prior Order of this Court dated Saturday, January 26, 2019, requiring that the Personal Representative file a federal estate tax return and that she elect for Bertha Virginia Maust-Thompson's unused federal estate tax exclusion amount to be ported to Robert M. Thompson. The January 26 Order additionally set forth interim deadlines for the Personal Representative to comply with this Court's determination that the Personal Representative was required to timely prepare and file the federal estate tax return. When the March 12, 2019, deadline passed and the Personal Representative had not filed the documents

this Court required by that date, the Applicants filed a Motion for Appointment of a Special Administrator. That Motion was granted in the March 15, 2019 Order, which the Personal Representative now asks this Court to reconsider.

ARGUMENT

On February 4, 2019, the Personal Representative appealed the January 26 Order. The Notice of Appeal was filed in the appellate court¹ and in the probate court and was served upon the Applicants. On February 15, 2019, the appeal was dismissed *sua sponte* by the appellate court on the basis that the January 26 Order was not a final order. On February 26, 2019, the Personal Representative timely filed a Motion for Reconsideration under Rule 221, SCACR, in order to move forward with the appeal. That Motion for Reconsideration is still pending and no remittitur has been sent to the lower court. In fact, by letter dated March 13, 2019, the South Carolina Court of Appeals acknowledged receipt of the petition for rehearing and allowed opposing counsel 10 days to file a return to the motion. (See attached Exhibit B)

The appellate court retains jurisdiction until the remittitur is sent to the lower court. *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013). According to Rule 221, SCACR, if a request for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the request for rehearing. Thus the appeal is still pending. See Rule 221, SCACR. *McDowell v. S.C. Dep't of Soc. Serv.*, 300 S.C. 24, 386 S.E.2d 280 (Ct.App.1989). (Where there has been an appeal, final disposition of the case occurs when the remittitur is filed in the circuit court.)

¹ The Notice of Appeal was filed in the Court of Appeals rather than the Supreme Court. Appeals that are filed in the incorrect court may be transferred to the proper appellate court pursuant to Rule 204, SCACR and S.C. Code Ann. 14-8-260, and Applicants so requested on February 12, 2019 (See attached Exhibit A).

S. C. Code Ann. § 62-1-308(h) provides that when an appeal is taken from a probate court order, “all proceedings in pursuance of the order, sentence or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had.” In justifying the appointment of a Special Administrator, this Court states “pursuant to this court’s order dated January 26, 2019, paragraph VI of the Conclusions and S.C. Code Ann § 62-3-601, this Court shall appoint a Special Administrator to secure the proper performance of the duty of the Personal Representative of Decedent’s Estate to file the estate tax return to elect portability.” The appointment of a Special Administrator by this Court was therefore solely to ensure compliance with the January 26 Order, the very Order that is on appeal. By law, this Court has no jurisdiction to enforce any deadlines or requirements set in the January 26 Order requiring the Personal Representative to elect portability since that Order is on appeal, no remittitur has been filed, and proceedings pursuant to that Order are stayed by statute.

In sum, the Application for Appointment of a Special Administrator should be rescinded and no proceedings in furtherance of the January 26 Order should be had until the appeal is decided and the remittitur is sent to the probate court.²

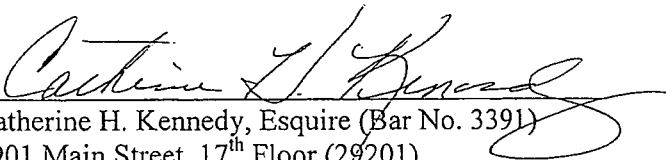
CONCLUSION

For the reasons stated above, the Personal Representative requests that this Court grant her Motion and rescind its Order Appointing Special Administrator and dismiss Thompson’s Application for Special Administrator.

² The Personal Representative is cognizant of the short time frame for the appeal and will request that the appellate process be expedited to accommodate the May 28, 2019 deadline for the irrevocable election to be made. Unfortunately the unexpected and unwarranted dismissal of the appeal has regrettably delayed the matter.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

By: 
Catherine H. Kennedy, Esquire (Bar No. 3391)
1901 Main Street, 17th Floor (29201)
P.O. Box 1473
Columbia, South Carolina 29202
Telephone: (803) 254-2200
Facsimile: (803) 400-1567
ATTORNEYS FOR PETITIONER

March 20, 2019

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PROBATE COURT

IN THE MATTER OF: BERTHA MAUST-THOMPSON

CASE NUMBER: 2017 ES40 01330

CERTIFICATE OF APPOINTMENT AS SPECIAL ADMINISTRATOR

This is to certify that

W. STEVEN JOHNSON, ESQUIRE

is the duly qualified **SPECIAL ADMINISTRATOR**

in the above matter and that this appointment, having been executed on the 15th day of March, 2019, is now in effect.

RESTRICTIONS:

W. Steven Johnson, Esquire is appointed Special Administrator for the sole purpose of preparing and filing the estate tax return. The appointment of Special Administrator will be terminated once confirmation has been received that the estate tax return has been filed.

Executed this 2nd day of May, 2019.

Amy W. McCulloch

Amy W. McCulloch
Richland County Probate Judge

Do not accept a copy of this certificate without the raised seal of the Probate Court.

EXHIBIT D

89268

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
PROBATE COURT

Richland County Probate Case No. 2017-ES-40-01330

Honorable Judge Amy W. McCulloch

Appellate Case No. 2019-000169

In the Matter of the Estate of Bertha Maust-Thompson

Terri Ann Thompson, Wendy K. Thompson, and Robert M. Thompson, Jr., as Co-Personal Representatives of the Estate of Robert M. Thompson, Sr.....Respondents.

v.

Marilyn M. White, As Personal Representative of the Estate of Bertha Virginia Maust-Thompson.....Appellant,

APPELLANT'S MOTION FOR SUPERSEDEAS
PURSUANT TO RULE 241(c)

The Appellant, Marilyn M. White in her capacity as Personal Representative of the Estate of Bertha Virginia Maust-Thompson, files this Motion for Supersedeas Pursuant to South Carolina Rules of Appellate Procedure Rule 241(c).

The Order of the probate court appealed from in this case, attached as **Exhibit, A**, included an injunction that Appellant, as Personal Representative of the Estate of Bertha Virginia Maust-Thompson, should file an estate tax return no later than May 27, 2019, and elect portability of the deceased spousal unused exclusion. In that same order, the probate court

established interim steps to be followed. Those steps included the selection of an independent public accountant to prepare the return within fifteen days after the date of the Order (Paragraph II, Pages 15 and 16). Appellant complied with this directive in a timely fashion by designating Burkett, Burkett & Burkett as the accounting firm.

Paragraph III on Pages 15 of 16 directed that a draft of the tax return was to be provided to the court and opposing counsel within forty-five days of the Court's Order, or by March 12, 2019. Appellant has been unable to comply with the requirements of this interim directive because the accounting firm is not able to devote the time necessary to complete its task since they are right in the middle of both partnership and individual tax filing season, concluding on March 15 and April 15. See the attached statement from the Burkett, Burkett & Burkett attached hereto as **Exhibit B**.


Therefore, Appellant seeks a stay of the probate court order as it relates to Paragraphs III and IV to allow the accountants to complete their task by April 26, 2019. Completion by that date would still allow for production, review and comment so that the estate tax return could still be filed by the May 27, 2019 deadline of the appealed order of the probate court if not reversed or modified by then.

Application for a supersedeas under Rule 241 of the South Carolina Rules of Appellate Procedure is made to this Court since an appeal of the probate court order was timely made, vesting this Court with jurisdiction, and no remittitur has been made. The probate court would have no jurisdiction under these circumstances.

(SIGNATURE ONLY ON FOLLOWING PAGE)

Respectfully submitted,

March 12, 2019



W. Duvall Spruill, Esq. (Bar No. 5295)
E-mail: dspruill@turnerpadget.com
Cathy Kennedy, Esq. (Bar No. 3391)
E-mail: ckennedy@turnerpadget.com
P.O. Box 1473
Columbia, South Carolina 29202
Telephone: (803) 254-2200
Fax: (803) 799-3957

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

The Honorable Amy W. McCulloch, Probate Judge

Appellate Case No. 2019-000727

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JUN 17 2019

S.C. SUPREME COURT

In the Matter of the Estate for Bertha Maust-Thompson

Terri Ann Thompson, Wendy K. Thompson, and Robert
M. Thompson, Jr, as Co-Personal Representatives of the
Estate of Robert Miller Thompson, Sr.,..... Respondents,

v.

Marilyn M. White, as Personal Representative of the
Estate of Bertha Maust-Thompson,..... Petitioner.

PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm of Willoughby & Hoefler, P.A., have
caused to be served this day one (1) copy of the Respondents' **Reply in Support of Motion to
Dismiss Petition for Writ of Certiorari** via hand-delivery to the following:

Catherine H. Kennedy, Esquire
Duvall Spruill, Esquire
Turner Padget Graham & Laney P.A.
1901 Main Street, Suite 1700
Columbia, SC 29201


Elizabeth Kurtz

Columbia, South Carolina
This 17th day of June 2019